STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

TDS Metrocom, LLC	**)**	
-vs-	**)**	
Illinois Bell Telephone Company	**)**	
	)	**03-0553**
Complaint concerning imposition of unreasonable	**)**	
And anti-competitive termination charges by	**)**	
Illinois Bell Telephone Company.	**)**	

BRIEF ON EXCEPTIONS OF SBC ILLINOIS

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BRIEF ON EXCEPTIONS OF SBC ILLINOIS

Illinois Bell Telephone Company ("SBC Illinois" or "the Company") hereby files its Brief on Exceptions in the above-captioned complaint proceeding.

I. INTRODUCTION

The principal issue in this proceeding has been the reasonableness of the charges SBC Illinois assesses when its retail business customers terminate service agreements prior to the expiration of the contracted or tariffed term. The Proposed Order concludes that SBC Illinois' current policies are not unreasonable and are not anticompetitive. In fact, the Proposed Order concludes that the approach urged by TDS Metrocom ("TDS") (i.e., "give-back-the-unearned-discount") is not competitively superior and should not be mandated for other carriers. SBC Illinois supports these conclusions. Overall, this portion of the Proposed Order is well-reasoned and consistent with the record.

SBC Illinois does not support, however, that portion of the Proposed Order that requires SBC Illinois to perform termination liability calculations for CLECs upon request. This requirement simply shifts marketing costs that should be incurred by CLECs to SBC Illinois and makes SBC Illinois a *de facto* member of the CLECs' sales teams. Such a result is completely inappropriate from a competitive perspective. It also goes well beyond what other regulatory commissions have required. SBC Illinois should not be required to perform these calculations for CLECs at all. At a minimum, however, the Commission should defer any decision on this issue until the conclusion of the rulemaking proceeding which it orders Staff to initiate, so that all carriers will be treated even-handedly.

In addition, SBC Illinois should not be obligated to pay TDS' legal fees and costs through March 2004. SBC Illinois should not be required to pay *anything*. The Proposed Order concludes that SBC Illinois' current termination liability policies are reasonable and there is no basis under Section 13-514 of the Act to award costs to TDS in that circumstance. Nor is there record evidence to support a finding that SBC Illinois' prior termination liability policies were unreasonable or anticompetitive. Even if the Commission disagrees, requiring the payment of fees to TDS through March 4, 2004 is unreasonable. SBC Illinois' obligations should end as of the filing of TDS' initial testimony in December of 2003, when SBC Illinois had committed to make the changes that the Proposed Order approves, and the amounts should be pro-rated to reflect the fact that most of SBC Illinois' prior policies were consistent with the standards approved in the Proposed Order.[1]

II. TERMINATION CHARGE METHODOLOGY

SBC Illinois supports the Proposed Order's conclusion that its current termination liability policies are not unreasonable and are not anticompetitive. *Proposed Order* at 18-19. The Proposed Order accurately reflects the record evidence that SBC Illinois' 25%/35%/50% policies comport with its economic loss analyses and that such "forward-looking" policies are consistent with the practices of virtually all other carriers in the marketplace. *Id.* at 19. The Proposed Order is also correct that TDS' "give-back-the-unearned-discount" approach is not

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[1] SBC Illinois' proposed changes to the text of the Proposed Order are provided in Attachment A.

competitively superior and runs counter to the normal expectations of customers and carriers operating under term agreements. *Id.*

However, certain statements in the "Commission Analysis and Conclusions" section do not accurately reflect the record evidence and should be changed. SBC Illinois takes particular exception to the suggestion that it was using ". . . very high termination liability provisions similar to those we found objectionable in the *Ascent Order*" prior to the filing of TDS' Complaint. *Proposed Order* at 18. This is simply incorrect – SBC Illinois ceased using 100% termination liabilities in *2002*, following the *Ascent Order*. SBC Ill. Ex. 1.0 (Gillespie Direct) at 8, 17. Because this misimpression factors into the Proposed Order's decision to require SBC Illinois to pay TDS' attorney's fees, it should be corrected. This issue will be discussed in more detail *infra*.

III. CALCULATION OF TERMINATION CHARGES BY SBC ILLINOIS FOR CLECS

SBC Illinois strongly objects to the Proposed Order's recommendation that it be required to calculate termination charges for CLECs. *Proposed Order* at 26-27. This new obligation is not supported by the record evidence, does not reflect commercial practice in the marketplace, has not been adopted by other state commissions and is not being applied even-handedly to all competitors.

The Proposed Order wrongly accepts TDS' blanket assertion that a "CLEC has little chance of competing with SBC . . . if the CLEC cannot obtain termination charge calculations." *Proposed Order* at 26. As SBC Illinois has repeatedly pointed out, this begs the question of *who* should be obligated to perform these calculations and from *where* the information should be obtained. CLECs can perform such calculations themselves or request the information through the end user customer. SBC Illinois provides its customers with copies of contractual term agreements as a routine part of the contracting process. Customers taking service pursuant to tariffed term plans can obtain a copy of confirming documentation upon request. The customer can then elect to provide copies of this documentation to the CLEC in any negotiations to change service providers. In many instances, these documents would allow CLECs to estimate the liability that would result from early termination themselves. Where calculations by the CLEC are impracticable, they can obtain the information they need through the customer. SBC Illinois' practice is to calculate termination liabilities for its customers, regardless of the purpose of the request. SBC Ill. Ex. 5.0 (Kent Surrebuttal) at 8-9.

Both of these avenues are commercially reasonable. As SBC Illinois explained during the proceeding, a small number of CLECs are responsible for the vast majority of CLEC requests for the calculation of termination liabilities. The other CLECs that compete for SBC Illinois' customers under term agreements either perform the calculations "in house" or work through the customers directly. Nothing prevents TDS from taking the same approach. Thus, it is *not* competitively necessary for CLECs to submit such requests directly to SBC Illinois. SBC Ill. Ex. 5.0 (Kent Surrebuttal) at 12.

The Proposed Order ignores the fact that the obligation imposed on SBC Illinois has no counterpart in the regulatory policies of other states. No other state commission in the Midwest imposes such a requirement on carriers operating in its state. Although the *Ascent Order* requirement that termination liabilities be calculated for the ValueLink family of services was modeled on an Ohio Commission order, that order is no longer operative. It was a one-time event when competition for local exchange service was first authorized in Ohio and it expired for SBC Ohio years ago. SBC Ill. Ex. 5.0 (Kent Surrebuttal) at 13-14. In other words, the Ohio requirement, like the *Ascent* Order requirement, was viewed as necessary when competition was first taking hold. With the maturation of the competitive marketplace, there was and is no reason to continue these obligations. No other carrier, in fact, provides such calculations to its competitors, and the marketplace functions perfectly well. SBC Ill. Ex. 5.0 (Kent Surrebuttal) at 12-13.

SBC Illinois further objects to this requirement because it is unduly burdensome and competitively inappropriate. Although TDS frames its request in terms of competitive necessity, in reality it reduces to cost and burden. Based on long experience handling CLEC requests, the Company has concluded that CLECs use SBC Illinois' resources for this purpose primarily because it is easy and costless. It is more economical for the CLEC to ask SBC Illinois to perform these calculations than to have their own employees spend time doing so. In effect, the CLECs have made SBC Illinois' employees part of their sales staffs. SBC Illinois does not believe that this is a proper or necessary role for it to play. Moreover, SBC Illinois would actually have to *add headcount* to comply with the Proposed Order, while the CLECs avoid incurring any costs of their own. SBC Ill. Ex. 5.0 (Kent Surrebuttal) at 7, 12. This is completely inappropriate in a competitive environment.

The Proposed Order contends that SBC Illinois' concerns about the burden that this requirement would impose on it ". . . are overstated." *Proposed Order* at 26. There is absolutely no record evidence to support such a conclusion – the Proposed Order simply creates it out of thin air. The fact that this requirement would necessitate adding headcount was based on the sworn testimony of SBC Illinois' manager responsible for performing these calculations based on years of experience. SBC Ill. Ex. 5.0 (Kent Surrebuttal) at 1-2, 7. There is no contrary evidence (or even cross-examination) that would dispute this conclusion.

The Proposed Order summarily dismisses SBC Illinois' concerns on the grounds that they were based on its experience under its historical, non-standardized termination liability provisions and, therefore, do not apply now that they have been standardized. *Id.* at 27. The Proposed Order is mistaken. SBC Illinois' witness clearly understood that the Company's termination liability policies had changed on a going-forward basis. SBC Ill. Ex. 5.0 (Kent Surrebuttal) at 11. However, based on the witness' expert opinion, SBC Illinois would *still* have to add personnel to comply with an expanded calculation obligation. Moreover, for the next couple of years, the process of calculating termination liabilities will be *more* complex, not less complex, than it was before. Although only the new policies apply to customers entering into agreements today, SBC Illinois' pre-March 2004 base of customers will be charged *either* the termination liability that would have applied under their existing agreement *or* the new termination liability, whichever is *less*. SBC Ill. Ex. 1.0 (Gillespie Direct) at 15. In other words, until all existing term agreements expire, SBC Illinois will be in the unenviable position of making more calculations, not fewer calculations, and they will be no less complex.[2] Therefore, the Proposed Order's attempt to dismiss SBC Illinois' concerns about undue burden is unavailing.

The Proposed Order further contends that SBC Illinois' policies will improperly reduce the flow of information to the CLECs – either because the customer is less likely to make the request or because SBC Illinois may dissuade the customer from changing its service provider. *Proposed Order* at 27. SBC Illinois *does* make the assumption that the burden of performing these calculations will be reduced under its new policy, but for different reasons. *First*, it has

[2] This need for multiple analyses varies by product. For Centrex service, customers will always be better off under the new policy, so duplicate calculations are not required. Similarly, Usage customers will fare the same or do better under the new policy. However, Data Transport and Other products offered previously under a "give-back-

been SBC Illinois' experience that many CLEC-generated requests involve customers who have little or no real interest in changing providers. SBC Ill. Ex. 5.0 (Kent Surrebuttal) at 9-10. In other words, the CLECs are just on a "fishing expedition." It is simply not reasonable to ask SBC Illinois to bear the costs of performing calculations in these circumstances. Requiring the customer to make the request *appropriately* cuts down on non-serious inquiries.

Second, customer involvement expedites the calculation process. Although some CLECs are sophisticated and knowledgeable, many are not. It is not unusual for a CLEC making a request to have only the sketchiest information about the customer's service. When there are questions, CLECs usually have to go back to the customer for more information and the information coming back from the CLEC is not always accurate or clear. CLECs also may request multiple iterations based on different possible scenarios, particularly where the CLEC is just beginning its discussions with the customer. SBC Ill. Ex. 5.0 (Kent Surrebuttal) at 5-6. This is less likely to happen when the customer is involved.

In short, SBC Illinois' policies are reasonable and are consistent with standard practice in the marketplace. Therefore, the Proposed Order's recommendations on this issue should not be adopted.

* * * * *

SBC Illinois recognizes that the Commission may conclude that the Proposed Order's view of this calculation issue has merit. However, that does not mean that TDS' request should be granted at this juncture. Even the Proposed Order recognizes the need for equal treatment in the marketplace:

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the-unearned-discount" methodology will require calculations under both the old and new policies to determine which produces the lower liability.

> "While we agree with SBC that this obligation should not be imposed on SBC alone, only SBC and TDS are before us at this time. Until this issue is addressed in a rulemaking, we cannot make this requirement applicable to other carriers." *Proposed Order* at 27.

Accordingly, the Proposed Order requires Staff to initiate a rulemaking to consider this issue on an industry-wide basis. *Proposed Order* at 31.

Given that the regulatory requirement contemplated by the Proposed Order is intended to apply to all carriers, most of whom did not participate in this proceeding, the Commission should view its findings in this proceeding as tentative. It would be premature for the Commission to reach any final conclusion, even with respect to SBC Illinois. After hearing from the other carriers in Illinois, the Commission may or may not conclude that such a calculation requirement is appropriate. In other words, the Commission should maintain the competitive *status quo* and defer any final decision until the conclusion of the rulemaking proceeding. In that manner, the Commission can ensure fair treatment in the marketplace.

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Even if the Commission decides not to defer a final decision to the rulemaking proceeding, changes need to be made to the Proposed Order. *First*, at the very minimum, the Commission should make clear that any obligation imposed in this proceeding will be superseded by its decision in the rulemaking proceeding. *Second*, the Proposed Order accepts TDS' proposal that non-*Ascent Order* calculations be performed within five days, rather than three days. *Proposed Order* at 27. As SBC Illinois indicated in its Reply Brief, this modest change in the interval does not solve the administrative problems SBC Illinois will face. SBC Ill. Reply Br. at 9. For example, requests for termination liability calculations for data services can involve literally hundreds (or, in some cases, thousands) of circuits. It would not be possible to complete the calculation work on such large requests in five days. Given that this issue was never addressed in testimony[3], SBC Illinois recommends that it be directed to work with TDS and Staff to establish reasonable administrative parameters applicable to this obligation. The Commission may wish to retain jurisdiction over this issue in the event the parties cannot reach agreement.

IV. TDS' REQUEST FOR REIMBURSEMENT OF FEES AND EXPENSES

The Proposed Order's conclusion that SBC Illinois should be required to reimburse TDS for legal fees and expenses under Section 13-516 of the Act is completely unwarranted. *Proposed Order* at 37-38. The Proposed Order is wrong on the law and the facts.

First, the Commission must make a finding of *unlawfulness* under Section 13-514 of the Act to justify an award of attorney's fees under Section 13-516. The Proposed Order properly recognizes that the fact that a CLEC complaint results in pro-competitive action by the ILEC is not a trigger for awarding fees under Section 13-514.[4] *Proposed Order* at 38. It is well established that Section 13-516, like other fee-shifting statutes, must be strictly construed. *Globalcom, Inc. v. Ill. Comm. Comm. and Ill. Bell Telephone Co.*, Nos. 1-02-3605, 1-03-0068 Consol., slip op. at 36 (1st Dist. 2004). Thus, the issue is whether SBC Illinois' *current* policies are anticompetitive – and the Proposed Order concludes that they are not. If they are not violative of Section 13-514, then there is no basis for an award of costs to TDS.

The Proposed Order, however, takes the position that it can award attorney's fees for *prior* policies that were changed. The Proposed Order reasons that the termination liability policies used by SBC Illinois prior to its 25%/35%/50% approach were ". . . similar in magnitude . . ." to the 100% termination liability provisions rejected by the Commission in the *Ascent*

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[3] TDS first suggested modifying the *Ascent Order*'s three-day requirement to five days in its Initial Brief. TDS Init. Br. at 24.

[4] SBC Illinois notes that the TDS Complaint did not *cause* SBC Illinois' change in policy – it simply accelerated a process that was already underway. SBC Ill. Ex. 1.0 (Gillespie Direct) at 17-18.

Order, and that SBC Illinois was on notice that the Commission considered 100% termination liabilities to be "inherently anticompetitive." *Proposed Order* at 38, Finding (8). The Proposed Order concludes, therefore, that SBC Illinois' historical policies were anticompetitive and in violation of Section 13-514 of the PUA, thus justifying the award of attorney's fees. *Id.* at 38, Finding (9).

First, TDS (and the Proposed Order) cite to no authority that would permit the award of attorney's fees for conduct that is purely historical in nature and has no current application. Since SBC Illinois changed its policies at the outset of the proceeding, virtually the entire record was directed at the lawfulness of SBC Illinois' *new* policies, a point on which SBC Illinois, not TDS, prevailed. In effect, the Proposed Order requires SBC Illinois to finance its competitor's pursuit of a meritless position. This outcome represents bad public policy.

Second, even ignoring so fundamental a flaw in the reasoning of the decision, it would be improper to attach legal liability to these superseded policies.[5] Since the prior policies are no longer in effect, the approach recommended by the Proposed Order has exactly the same effect as awarding TDS attorney's fees for prompting pro-competitive action by SBC Illinois. The Proposed Order recognizes that such a result is *not* legally proper. *Id*. at 38.

Third, the Proposed Order is simply wrong on the facts. The Proposed Order's entire analysis is premised on the assumption that SBC Illinois' prior policies resulted in termination liabilities on the order of 100% – a misstatement which Staff made in testimony and never bothered to correct. Staff Ex. 1.0 (Omoniyi Direct) at 14; Staff Init. Br. at 14. In fact, SBC Illinois stopped using 100% termination liabilities in *2002*. SBC Ill. Ex. 1.0 (Gillespie Direct) at 8, 11; SBC Ill. Ex. 1.1 (Gillespie Rebuttal) at 3-4. Although there were inconsistent approaches to termination liabilities in SBC Illinois' tariffs and contracts that needed to be standardized at the time TDS filed its Complaint, *none* were at 100%. Below is a chart showing SBC Illinois' then applicable termination liabilities:

? Usage: 35% - 50%

? Data Transport and Other Products: give-back-the-unearned-discount or 50%

? Centrex: 75% - 85%[6]

This record simply does not permit a finding that these termination liability policies were *unlawful*. The Proposed Order itself finds a 35% policy for Usage to be reasonable. The 50% termination liability used for certain usage products and in ICBs was fully supported by SBC Illinois' economic loss analyses presented in this proceeding and Staff's informal guidelines used in industry workshops. SBC Ill. Ex. 1.0 (Gillespie Direct) at 21, 23; SBC Ill. Ex. 1.1 (Gillespie Rebuttal) at 5-6, 9-10. In fact, SBC Illinois would have adopted a 50% termination liability for usage services, but for the "history" associated with the *Ascent Order*. SBC Ill. Ex. 1.0 (Gillespie Direct) at 23. This testimony is uncontroverted in the record. Since the Proposed Order accepts SBC Illinois' economic loss analyses as an appropriate benchmark for determining termination liabilities, there is no basis for finding either 35% or 50% unlawful for Usage services.

Data Transport and Other products were previously subject to either a "give-back-the-unearned-discount" methodology or a 50% termination liability policy. TDS and Staff *supported* use of the "give-back-the-unearned-discount" methodology. Although both SBC Illinois and the Proposed Order found serious deficiencies in this methodology, the Proposed Order explicitly

[5] The delay between the announcement of the new policy in December 2003 and its implementation in March 2004 resulted from the need for extensive internal implementation work, as well as the need to provide CLECs with 45 days advance notice of the changes. SBC Ill. Ex. 1.0 (Gillespie Direct) at 14-15.

[6] SBC Ill. Ex. 1.0 (Gillespie Direct), p. 11, Sched. BG-2.

states that TDS is free to use it in its agreements. *Proposed Order* at 19. Therefore, it cannot have been unlawful when used by SBC Illinois. The Proposed Order approves the 50% policy for Data Transport and Other products. Therefore, that liability cannot be considered unlawful.

The situation with respect to Centrex service is a little more complex. Centrex service is the one product family where the new termination liability (25%) is significantly lower than the prior termination liability (75%-80%). However, the record does not support a finding that the old policy was *unlawful*. As SBC Illinois explained, its new policy assumes that all of the underlying network costs incurred in providing a service are avoidable – in other words, reusable. SBC Ill. Ex. 1.0 (Gillespie Direct) at 22. This assumption is very conservative and biased in favor of the customer, because facilities freed up when a customer terminates an agreement may not be immediately reused. *Id.* From an economic perspective, costs associated with network facilities that are not reused can be included in the damages calculation. SBC Ill. Ex. 2.0 (Frankel Direct) at 26-27.

SBC Illinois' prior Centrex policy simply assumed less possibility of reuse and this assumption was not unreasonable. Between 2001 and 2003, lines (and profits) lost by SBC Illinois when customers migrated to CLECs were not offset by new demand, thus stranding the facilities used to provide service. The stranding of facilities when a customer moves from Centrex to a PBX is particularly acute, because Centrex requires many more loops than a comparably-sized PBX. Thus, the Company could have legitimately included network costs in determining its termination liability for Centrex during that period, justifying a 75% - 85% termination liability calculation. SBC Ill. Ex. 1.1 (Gillespie Rebuttal) at 5-6. There is no contrary evidence in the record. Thus, SBC Illinois' prior Centrex termination liability cannot simply be analogized to the 100% policy rejected in *Ascent Order* to support a finding of unlawfulness. The undisputed facts supporting SBC Illinois' approach would have to be assessed based on the record – something the Proposed Order does not do – and the record does not support a conclusion that it is unlawful.[7]

In short, a finding of unlawfulness is not possible for any of the termination liabilities used by SBC Illinois prior to the filing of TDS' Complaint.

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Again, SBC Illinois recognizes that the Commission may take a different view of this issue. Even if the Commission agrees with the Proposed Order that *some* fees are justified – which it should not – it is arbitrary and capricious to award 100% of TDS' costs through March 4, 2004. SBC Illinois announced the changes to its termination liability policies in *December of 2003*, shortly before TDS filed its direct testimony. TDS Ex. 1.0 (Loch Direct) at 17. TDS could have stopped this litigation there. Instead, TDS continued to argue that the Commission should impose its "give-back-the-unearned-discount" policy on SBC Illinois – a position which the Proposed Order rejects. SBC Illinois should not be required to pay for litigation expenses incurred by TDS *disputing* the very policies which the Proposed Order finds reasonable. At most, TDS should be awarded attorney's fees through the filing of its direct testimony in December of 2004.

Furthermore, it is patently unreasonable to award TDS 100% of its fees over even this shorter period of time. The Commission *cannot* find, based on this record, that SBC Illinois' prior termination liabilities for Usage and Data Transport and Other products were unlawful. At most, the Commission could have concerns about Centrex service (albeit unwarranted). Although the record does not quantify Centrex term agreements (tariffed and contracted) as a

[7] The CLECs offering Centrex service charge between 75% and 100% termination liabilities. SBC Ill. Ex. 1.0 (Gillespie Direct), Sched. BG-3. SBC Illinois agrees that the conduct of other carriers is not *dispositive* of the

percentage of the agreements in place when TDS filed its Complaint, Centrex contracts were clearly a small percentage of total contracts. TDS Ex. 1.1, Data Request No. 1.6. Thus, the *maximum* allocation of TDS' fees to Centrex would be 33% (assuming a one-third, one-third, one-third distribution among the three product families) and, in fact, should arguably be much less. Therefore, TDS should be awarded no more than one-third of its expenses up to December 4, 2003.

V. CONCLUSION

In conclusion, this Commission should modify the Proposed Order in this proceeding consistent with this Brief on Exceptions and Attachment A.

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

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reasonableness of its own policies. However, it is certainly *relevant*. *Proposed Order* at 38.

CERTIFICATE OF SERVICE

I, Louise A. Sunderland, an attorney, certify that a copy of the foregoing **BRIEF ON EXCEPTIONS OF SBC ILLINOIS** was served on the parties on the attached service list by U.S. Mail and/or electronic transmission on August 13, 2004.

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Louise A. Sunderland

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